Supreme Court, U.S.
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No. 98-35

In The

Supreme Court of the United States

October Term, 1997

ARETHA ANN ATWATER,

Petitioner,

vs.

FEDERAL EXPRESS CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Eighth Circuit properly affirmed the district court's grant of summary judgment to Respondent by concluding Petitioner presented insufficient evidence to show Respondent's decision to terminate Petitioner was discriminatory?

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding. FDX Corporation is a parent company of Respondent. The following are nonwholly-owned subsidiaries of Respondent: Flying Tigers Limited; and The Flying Tiger Line (NZ) Limited.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Cited Authorities	iv
Statement of the Case	1
Reasons for Denying the Writ	7
I. The Eighth Circuit Has Consistently Applied This Court's Decision In *Hicks*.	8
A. Atwater Misstates the Burden at the Third Stage of McDonnell Douglas.	9
B. The Eighth Circuit has Consistently Held that the Plaintiff Must Show the Employer's Stated Reason is Pretext for Discrimination.	11
II. The Eighth Circuit Correctly Applied *Hicks* in Atwater's Case.	14
Conclusion	18

TABLE OF CITED AUTHORITIES

Page

Cases Cited:

Barge v. Anheuser-Busch, Inc., 87 F.3d 256 (8th Cir. 1996) 8

Gill v. Reorganized School District R-6, 32 F.3d 376 (8th Cir. 1994) 17

Herrero v. St. Louis University Hospital, 109 F.3d 481 (8th Cir. 1997) 16

Johnson v. Baptist Medical Ctr., 97 F.3d 1070 (8th Cir. 1996) 8, 16

Kneibert v. Thomson Newspapers, Michigan Inc., 129 F.3d 444 (8th Cir. 1997) 12

Landon v. Northwest Airlines, Inc., 72 F.3d 620 (8th Cir. 1995). 9, 10

McCuliough v. Real Foods., Inc., 140 F.3d 1123 (8th Cir. 1998) 12

McDonnell Douglas v. Green, 411 U.S. 792 (1973) .. 7, 8, 17

Meiri v. Dacon, 759 F.2d 989 (2d Cir.), *cert. denied*, 474 U.S. 829 (1985) 17

O'Bryan v. KTIV Television, 64 F.3d 1188 (8th Cir. 1995) 11, 13

Table of Cited Authorities

Page

Rothmeier v. Investment Advisers, Inc., 85 F.3d 1328 (8th Cir. 1996) 9, 11, 13, 14

Roxas v. Presentation College, 90 F.3d 310 (8th Cir. 1996) 13

Ruby v. Springfield R-12 Public School Dist., 76 F.3d 909 (8th Cir. 1996) 16

Ryther v. KARE 11, 108 F.3d 832 (8th Cir.) (en banc), *cert. denied*, 117 S. Ct. 2510 (1997). 9, 10, 11, 13

St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993) 7, 8, 9, 10, 11, 12, 13, 14, 18

Turner v. Texas Instr., Inc., 555 F.2d 1251 (5th Cir. 1977) 17

Statutes Cited:

42 U.S.C. § 1981 1

42 U.S.C. §§ 2000e *et seq.* 1

STATEMENT OF THE CASE

On April 14, 1995, Petitioner Aretha Atwater filed a complaint against her former employer, Respondent Federal Express Corporation ("FedEx"), alleging race and sex discrimination as well as retaliation in violation of 42 U.S.C. §§ 2000e *et seq.* (Title VII) and 42 U.S.C. § 1981. Atwater's retaliation claim is not part of her Petition for Writ of Certiorari. The district court granted summary judgment in favor of FedEx, concluding Atwater did not establish a prima facie case on her claims, and Atwater did not present sufficient evidence to show that FedEx's legitimate nondiscriminatory reasons for terminating Atwater were a pretext for discrimination. Pet. App. 1-8. The Eighth Circuit, in a unanimous panel decision, affirmed the district court. The Eighth Circuit concluded that even if Atwater established a prima facie case of discrimination, she failed to show that FedEx's articulated reasons for the adverse employment action were a pretext for race or sex discrimination. Pet. App. 2-2.

In August 1988, FedEx hired Atwater as a part-time customer service agent ("CSA") at the company's Moline, Illinois station. Approximately three years later, she was promoted to senior CSA. Pet. App. 1-2. In April 1993, FedEx promoted Atwater to operations manager and transferred her to FedEx's Cedar Rapids, Iowa station. Five months later, she was given a performance review by the interim senior manager at the Cedar Rapids station. Pet. App. 1-2. The senior manager evaluated Atwater in ten categories on a scale of 1 to 4, with 4 being the highest. Atwater's quality of management was rated as a 2, and her overall rating was 2.9. During the performance review, the senior manager orally counseled Atwater on areas in which she would need to improve. (App. at 166-68.)

It soon became evident to FedEx, however, that Atwater would not improve, and as an operations manager, Atwater's

job performance was not satisfactory. Atwater had problems managing the employees in her work group and had conflicts both with her co-managers and her supervisors. In October 1993, Ratnam Philip, an Asian-Indian male, became Atwater's manager. It was apparent that Atwater had a personality conflict with Philip. *See* Pet. App. 1-5 to 1-6.

In April 1994, Atwater failed her management check ride certification. Pet. App. 1-3. During a check ride, a manager rides along with a courier on the courier's route to evaluate the courier's on-road performance. As an operations manager, Atwater needed to be proficient in observing and determining the courier's performance during check rides to enable her to communicate the company's expectations to the couriers and improve their performance. After the FedEx evaluator administered the management certification check ride to Atwater, he determined that based on the skills she demonstrated, "it would have been a grave error to herself as well as the couriers and Federal Express to certify her." (App. at 237.)

Later in April 1994, Atwater's subordinate employees voiced their lack of confidence in Atwater as a manager when they were given the opportunity to evaluate her pursuant to the company's survey feedback action ("SFA") process. Pet. App. 1-3. Prior to becoming a manager, Atwater also completed the SFA process as an employee evaluating her manager. Atwater described the process as a way for the employee to let the manager know areas in which they would like to see improvement by the manager and areas in which the manager had progressed or had experienced problems. (App. at 191.) As a result of Atwater's employees evaluating her with a critically low leadership index score of 49, out of a possible 100, FedEx issued Atwater a letter of counseling dated May 31, 1994. Pet. App. 1-3. The letter informed Atwater that she had demonstrated unacceptable performance and poor leadership and that she must

address those issues immediately. Atwater was also reminded that:

> The Federal Express Manager's Guide describes leadership as the most serious and far reaching in its impact . . . on morale . . . its effects are so great in significance to the Company that managers incapable of handling people cannot be retained in the leadership position.

(App. at 246-47.) FedEx further advised Atwater of ways to address the deficiencies and told her that if she could not repair the relationships with her employees and restore their trust and confidence in her ability to lead them, further disciplinary action ranging from removal from management to termination of employment could result. (App. at 246-47.)

On May 26, 1994, a CSA under Atwater's supervision revealed that Atwater had told her to report breaks on her time cards during periods in which she had not taken breaks in violation of the company's Acceptable Conduct Policy. Pet. App. 1-3. Based on these allegations of falsifying company documents, a preliminary investigation was conducted by Philip that included reviewing the CSA's personal journal of daily events, speaking with Atwater alone and in conjunction with a personnel manager, and receiving written responses from Atwater to certain inquiries. (App. at 196, 248-51, 258.) When it appeared that Atwater was not cooperating with the investigation, and in view of the seriousness of the allegations made against her, Atwater was suspended. (App. at 252-53.) FedEx learned that while Atwater was suspended for time card falsification, she telephoned the CSA and requested her to lie to the company's managing director in an apparent effort to save Atwater's job. (App. at 302.) As part of his continuing probe, Philip then consulted with the managing director for

FedEx's mid-central district, the company's personnel department, and a representative from the labor and employment group of the company's legal department. As a result of the investigation, it was determined that Atwater had violated the company's Acceptable Conduct Policy by falsifying company documents (the CSA's electronic time cards). In accordance with that policy, Atwater admittedly could have been terminated. (App. at 198, 267-70.) Instead, Atwater was allowed to stay in management, was given a warning letter, and her investigative suspension was changed to a disciplinary suspension without pay. (App. at 202, 278-79, 311.)

On August 3, 1994, FedEx suspended Atwater a second time after she again violated FedEx's Acceptable Conduct Policy by being insubordinate to her senior manager, Philip. Pet. App. 1-4. On that date, Atwater refused to meet with Philip, despite his repeated requests. After consultations between Philip, his managing director, the managing director of personnel and the legal department, FedEx issued Atwater a second warning for insubordination and demoted her. (App. at 206, 287-88, 298-303.) The company determined that Atwater's conduct was unacceptable under the company's Acceptable Conduct Policy, which states that "Insubordination or refusal to follow instructions" is a violation of company rules and may result in severe disciplinary action up to and including discharge. (App. at 205, 267-70, 284-86.) Atwater acknowledged that insubordination could have resulted in her termination, instead of her demotion. (App. at 205.)

On August 19, 1994, FedEx informed Atwater that she had been demoted to a senior CSA at the company's Milwaukee, Wisconsin ("MKEA") station effective immediately. Pet. App. 1-4. Atwater failed to report to the MKEA facility within the specified time. Accordingly, on September 1, 1994, Atwater was provided with a 90-day personal leave of absence in which

to secure another job within the company, for which she was qualified and capable of performing. Pet. App. 1-4. Despite Atwater's knowledge of the company's established system to place its employees in other available positions, her awareness that the company posted job openings in each facility, and her receipt of the weekly Career Opportunities Bulletins, which are comprehensive listings of job openings throughout the Federal Express system, Atwater did not submit a single application during that 90-day period. Pet. App. 1-4. On December 2, 1994, because Atwater had not secured another position, and thus failed to return from her leave of absence, her employment was terminated in accordance with the company's leave of absence policy.

During her leave of absence, Atwater filed internal grievances through the company's Guaranteed Fair Treatment Procedure ("GFTP"), claiming that her warning letters for falsification and insubordination, and her subsequent demotion, were unfair. The GFTP is a three-step process by which employees may challenge adverse job actions to three successively higher levels of management. Management at each level has the discretion to uphold, overturn, or modify the lower level's decision, and at each level the employee can submit any evidence for the company's consideration. (App. at 211, 272-75.) Atwater utilized each step of the process, and after the company fully investigated all of the allegations, management's decisions to issue the warning letters and to demote Atwater were upheld at all three levels. (App. at 209, 298-303.)

When experiencing problems as an operations manager at FedEx, and both before the district court and on appeal, Atwater has continuously and summarily concluded that her shortcomings as a manager were essentially the fault of her manager, Philip. In April 1994, after failing her check ride certification, Atwater contacted the company's human resources

department to report what she perceived as unfair and discriminatory treatment by Philip. The company fully investigated Atwater's concerns and determined that the evidence did not substantiate a discrimination claim.

Among the myriad complaints, Atwater claimed that Philip made negative comments about her abilities, excluded her from manager's meetings, excluded her from luncheon meetings, and interacted more with white male managers. Pet. App. 1-5 to 1-6. During her deposition, Atwater testified that she believed Philip's lack of communication was discriminatory due to various alleged comments made by Philip. *See* Pet. App. 1-6. The district court described the stray comments as "rather innocuous" and "impolitic." Pet. App. 1-8. Atwater presented no evidence that would indicate that any alleged discriminatory comment was made when Philip was deciding to discipline Atwater or had any connection with her violations of company policy.

Atwater also takes issue with Philip for a notation on her employee calendar regarding her work absences. Pet. 9. However, Atwater admits she was never disciplined for absenteeism, nor did she consider the calendar notation itself to be a form of discipline. (App. at 174.) Atwater also speculates that Philip had some influence in her failure to pass the management check ride certification. Pet 11. Yet, Atwater cannot identify even one conversation between Philip and the evaluator who conducted the check ride. In fact, Atwater cannot identify any FedEx manager or employee who exhibited the deficiencies she displayed during the check ride certification process. (App. at 177.)

Finally, Atwater claims that, despite all the documentary evidence to the contrary, Philip fabricated Atwater's falsification of company documents. Pet. 12-13. In fact, in so doing, she

submits that FedEx threatened the employee to make false statements. *Id.* Again, Atwater has no evidence whatsoever to support her allegation. (App. at 196.) Moreover, Atwater fails to explain the employee's written statements that Atwater told the employee to report breaks not taken, other than to deny generally that Atwater violated company policy. The district court noted Atwater's evasiveness, stating that Atwater has claimed that the employee's statements are "erroneous, ambiguous, or the result of confusion," but Atwater does not contend the statements were fabricated. Pet. App. 1-3.

REASONS FOR DENYING THE WRIT

This case involves the application of well-established case law governing employment discrimination. This Court recently clarified the standard for deciding summary judgment motions in *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993). Review should be denied in this case because the district court and the Eighth Circuit correctly applied *Hicks* to Atwater's facts and claims, and properly dismissed the claims on summary judgment. Atwater does not argue that *Hicks* should be overturned, nor does Atwater ask this Court to revisit the legal standard for establishing an employment discrimination claim using indirect proof. Further, no conflict among the circuits is even alleged. Atwater instead requests the Court to make another assessment of the facts in her individual case and apply Hicks, for the third time, to determine whether she has presented the appropriate quantum of proof to avoid summary judgment. This fact-bound, narrow issue is not of enough significance to warrant plenary review.

Atwater also contends that the Eighth Circuit has inconsistently applied *Hicks* to the evidentiary showing needed at the prima facie stage of the *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) framework. Atwater suggests the Court

grant the petition to further instruct the Eighth Circuit exclusively on the desired standard. Atwater's contention suffers from confusion between the prima facie and pretext stages of the *McDonnell Douglas* model, and a misreading of Eighth Circuit case law. Although Atwater spends the majority of her petition arguing that she has presented enough evidence to establish a prima facie case of employment discrimination, she ignores the fact that both the district court and the Eighth Circuit concluded that she did not present sufficient evidence that FedEx's reasons for termination were a pretext for discrimination. Because the Eighth Circuit has consistently applied *Hicks*, and the district court and the Eighth Circuit applied *Hicks* correctly in Atwater's case, review should be denied.

I.

THE EIGHTH CIRCUIT HAS CONSISTENTLY APPLIED THIS COURT'S DECISION IN *HICKS*.

In the district court, Atwater sought to meet her burden to present sufficient evidence to avoid summary judgment of her employment discrimination claims by invoking the familiar three-step framework enunciated in *McDonnell Douglas*, 411 U.S. 792 (1973). Under *McDonnell Douglas*, and its often court-refined principles, Atwater is permitted to prove her employment discrimination claims with indirect proof by first establishing a prima facie case of race or sex discrimination. Atwater must show: (1) she is a member of a protected class; (2) she is qualified for her position; (3) FedEx took adverse employment action; and (4) the circumstances surrounding the adverse action creates an inference of improper motivation. *Hicks*, 509 U.S. at 506; *Barge v. Anheuser-Busch, Inc.*, 87 F.3d 256, 258 (8th Cir. 1996) (§ 1981); *Johnson v. Baptist Medical Ctr.*, 97 F.3d 1070, 1072 (8th Cir. 1996) (Title VII).

If Atwater is able to establish a prima facie case, FedEx may rebut the inference of discrimination raised by the prima facie case by articulating a legitimate, nondiscriminatory reason for the adverse action. *Hicks*, 509 U.S. at 506-07. Once FedEx proffers its nondiscriminatory reason, Atwater must show "both that the reason was false, and that discrimination was the real reason." *Hicks*, 509 U.S. at 515. The Eighth Circuit has consistently followed *Hicks* by making clear that proof that an employer's proffered explanation is false by itself, does not entitle an employee to judgment, rather the evidence must show the explanation is a pretext masking discrimination. *Rothmeier v. Investment Advisers, Inc.*, 85 F.3d 1328, 1334 (8th Cir. 1996). The Eighth Circuit en banc recently held:

> We emphasize that evidence of pretext will not by itself be enough to make a submissible case if it is, standing alone, inconsistent with a reasonable inference of age discrimination. Furthermore, as the *Hicks* court explained, the plaintiff must still persuade the jury, from all the facts and circumstances, that the employment decision was based upon intentional discrimination.

Ryther v. KARE 11, 108 F.3d 832, 837-38 (8th Cir.) (en banc), *cert. denied*, 117 S. Ct. 2510 (1997).

A. Atwater Misstates the Burden at the Third Stage of McDonnell Douglas.

Atwater contends that the Eighth Circuit has failed to rule in a consistent manner because it has held that establishing a prima facie case is not an onerous hurdle; the plaintiff merely must establish "some evidence" to create an inference of improper motivation, the fourth prima facie element. *See Landon v. Northwest Airlines, Inc.*, 72 F.3d 620, 624 (8th Cir.

1995). Atwater argues that because she has presented "some evidence" to show her prima facie case, summary judgment is not appropriate. Atwater misunderstands that establishing the prima facie elements is only the first part of her burden. Once FedEx articulated its legitimate nondiscriminatory reasons for its employment actions, Atwater had the burden to show that the reasons were a pretext masking discrimination. The quantum of proof at the third stage of the proof model is much different than the prima facie burden. Atwater chooses to ignore the *Landon* panel's explanation of the different burden:

> [The Plaintiff's evidence] is sufficient to meet the fourth prong's minimal requirements of *some* evidence allowing for an inference of improper motivation.
>
> . . .
>
> Having articulated a legitimate business purpose, the burden shifts back to the Plaintiff to meet a more difficult standard; demonstrating that the Defendant's articulated reason for its action was (i) a pretext; (ii) for unlawful discrimination.

Landon, 72 F.3d at 624-25 (citing *Hicks*, 113 S. Ct. at 2748-49).

Neither this Court nor the Eighth Circuit has ever ruled that a plaintiff need only show "some evidence" to establish an employer's legitimate nondiscriminatory reasons were pretext for discrimination, the ultimate question. Quite the opposite is in fact true. In its en banc decision in *Ryther*, the Eighth Circuit stated:

> Panel opinions of this court have consistently held that the district court may grant summary judgment or JAML for the employer *even if Plaintiff has some evidence of pretext* if that evidence, for one reason or another, falls short of proving intention discrimination.

Ryther, 108 F.3d at 848 (Loken, J., filing separate opinion joined by majority of active judges) (emphasis added); *see also Rothmeier*, 85 F.3d at 1335 ("*Hicks* emphasizes that once an employment discrimination case reaches the third stage of McDonnell Douglas, it is to be treated like any other case.").

B. The Eighth Circuit has Consistently Held that the Plaintiff Must Show the Employer's Stated Reason is Pretext for Discrimination.

Atwater also contends that one Eighth Circuit case, *O'Bryan v. KTIV Television*, 64 F.3d 1188 (8th Cir. 1995), provided a lesser standard for plaintiffs than that enunciated in *Hicks*, and thus, is inconsistent. Pet. 19. Atwater points out that in *O'Bryan* the Eighth Circuit noted that a plaintiff may be able to prove employment discrimination without directly disproving the employer's reason for termination if the Plaintiff otherwise presents enough evidence to discredit the reason indirectly. Atwater argues that *Hicks* requires the plaintiff prove the reason is false, and quotes the off-cited language from *Hicks* that the plaintiff must show: "both that the reason was *false*, and that discrimination was the real reason." *Hicks*, 509 U.S. at 515 (emphasis added). The irony of Atwater arguing in her petition for a stricter standard for plaintiffs in the Eighth Circuit notwithstanding, Atwater's contention is incorrect.

This Court in *Hicks* made clear that the plaintiff must show more than the employer's stated reason is unworthy of credence:

> [N]othing in law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation of its action was not believable.

Hicks, 509 at 514-15. The key showing is that the employer's reason is a pretext *for discrimination*, not that the reason is necessarily "false" in a strictly quantifiable sense. This Court has made clear that in the context of the burden-shifting model, "false" means the fact-finder does not believe the reason or rejects it. Indeed, the Court explained:

> The fact-finder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination. . . .

Id. at 511.

The Eighth Circuit has consistently applied *Hicks* to the third and ultimate stage of the burden-shifting model, and required plaintiffs to put forward evidence that the employers' reasons are pretext for unlawful discrimination. *See, e.g.*, *McCullough v. Real Foods., Inc.*, 140 F.3d 1123, 1128 (8th Cir. 1998) ("[i]t is not enough . . . to *dis*believe the employer; the fact-finder must *believe* the plaintiff's explanation of intentional discrimination") (quoting *Hicks*, 509 U.S. at 519); *Kneibert v. Thomson Newspapers, Michigan Inc.*, 129 F.3d 444, 454 (8th Cir. 1997) ("[P]roof that the defendant's articulated

explanation is false or incorrect does not, standing alone, entitle the plaintiff to [summary] judgment; instead, the showing must be that the explanation is a pretext *for* discrimination."); *Ryther*, 108 F.3d at 837-38; *Roxas v. Presentation College*, 90 F.3d 310, 316 (8th Cir. 1996) ("This burden will not be met by simply showing that the reason advanced by the employer was false; rather, Roxas must demonstrate that a discriminatory animus lies behind the defendant's neutral explanations"); *Rothmeier*, 85 F.3d at 1334.

In *O'Bryan*, the Eighth Circuit adhered to *Hicks* in holding that the plaintiff must show that the employer's stated reason for employment action was pretext for discrimination. The panel pointed out, however, that a plaintiff may raise a genuine issue on whether the employer's action was motivated by a discriminatory intent by producing evidence that indirectly discredits the employer's stated reason, but does not necessarily directly disprove the reason. *O'Bryan*, 64 F.3d at 1192. In so holding, the panel distinguished the nature of the proof from the quantum of proof necessary to overcome summary judgment. This is clearly consistent with the holding in *Hicks* that the fact-finder's disbelief of the stated reason may in certain cases support a finding of intentional discrimination. *Hicks*, 509 U.S. at 511. It is also consistent with *Hicks* that in certain cases, the fact-finder's disbelief of the stated reason may not support a finding of intentional discrimination. *Hicks*, 509 U.S. at 514-15 (holding that even if employer's reason is not believable, plaintiff must still prove discrimination was the real reason.) The Eighth Circuit has consistently held that the bottom line in all cases is: the plaintiff must prove the employer's real reason for employment action is unlawful discrimination.

II.

THE EIGHTH CIRCUIT CORRECTLY APPLIED *HICKS* IN ATWATER'S CASE.

Having misunderstood her burden of proof and the *Hicks* standard for surviving summary judgment, Atwater concludes that the district court should not have entered summary judgment in favor of FedEx because she presented "some evidence" of improper motivation, establishing the fourth element of her prima facie case. Pet. 28. Atwater ignores both the district court's and the Eighth Circuit's holdings that even if she met the lesser burden of establishing a prima facie case, Atwater did not meet her burden of showing FedEx's nondiscriminatory reasons were pretext for discrimination. The Eighth Circuit has consistently followed *Hicks*, 509 U.S. at 511, in holding that the ultimate burden of persuasion remains with the plaintiff at each step of the analysis. *Rothmeier*, 85 F.3d at 1332.

In this case, contrary to Atwater's view, neither the district court nor the Eighth Circuit resolved factual disputes regarding Atwater's workplace violations in the company's favor, rather than hers. Indeed, the district court correctly stated in its decision that it was viewing the evidence in Atwater's favor, Pet. App. 1-7, and portrayed Atwater's alleged facts in its decision, Pet. App. 1-5 to 1-6. What Atwater refuses to acknowledge is that taking the facts in the light most favorable to her, the evidence is insufficient to raise the inference of unlawful discrimination. FedEx came forward with legitimate nondiscriminatory reasons for its employment actions: FedEx disciplined Atwater for falsifying company records, and demoted and terminated her for poor management skills, insubordination, falsifying company records, and failing to seek a different position within the company. Atwater presented no evidence that FedEx's reasons were not believable, let alone pretext for race or sex discrimination.

First, as to falsifying time records, FedEx conducted an investigation that revealed that Atwater told a subordinate employee to report one hour breaks when Atwater knew that the employee had not taken the breaks. (*See* App. at 248-66.) The employee provided statements to this effect during the investigation. FedEx also discovered that Atwater telephoned the employee and requested her to lie to the company's managing director in an effort to save Atwater's job. (App. at 268.) Atwater denies violating company policy and argues that the employee's statements are conflicting and confusing. Nevertheless, as the district court noted, Atwater does not contend that the employee's statements were fabricated. (App. at 86.) Clearly, FedEx was justified in sending Atwater a disciplinary counseling letter as a result of its conclusion that she violated company policy and later relying on this information to terminate her.

Second, as to Atwater's insubordination in refusing to meet with Philip in his office, FedEx placed Atwater on investigative suspension while investigating the situation. The company's investigation revealed that Atwater unjustifiably refused to meet with her supervisor, despite his repeated requests. Thus, FedEx was reasonable in concluding that Atwater was insubordinate within the meaning of the company's rules and in demoting Atwater for the violation.

Finally, Atwater presented no evidence to rebut the company's articulated reliance on Atwater's history of poor management skills as a reason to demote and discharge her. Atwater speculates that the reason her employees gave her a critically low leadership score is that Philip criticized her in front of the employees. Atwater has presented no evidence linking any comment that Philip made to the evaluations of her employees, who worked directly with Atwater. In addition, Atwater has no evidence to link her failure to pass the check ride certification on anything but her lack of skill.

Rather than putting forth specific evidence to show that FedEx's reasons for its actions are pretext for unlawful discrimination, Atwater instead points to stray comments made by Philip that are allegedly discriminatory. The comments themselves, categorized as "innocuous" and "impolitic" by the district court, do not alone indicate that Philip considered Atwater's race or sex when deciding to discipline or discharge her. Atwater fails to tie the comments to the decision-making process involved with her discipline or termination. *See Herrero v. St. Louis University Hospital*, 109 F.3d 481, 484 (8th Cir. 1997) (holding statements only constitute evidence of impermissible motive when made by decision-makers in the termination process and reflect a discriminatory animus permitting inference that animus was motivating factor in termination process). None of these comments were made when Philip investigated or disciplined Atwater for falsifying company records, or when Philip found Atwater insubordinate for failing to report to his office when ordered, which led to her termination. Taken as a whole, these comments by themselves do not reveal a discriminatory animus on Philip's part. *See Ruby v. Springfield R-12 Public School Dist.*, 76 F.3d 909, 912 (8th Cir. 1996).

Atwater also cites one incident in which a subordinate used a racially derogatory term and argues that in general, workplace racial tension can substitute for her showing of pretext by the decision makers in this case. Pet. 10. Clearly, Atwater is mistaken. *See Johnson*, 97 F.3d at 1073 (general workplace comments that were critical of females did not suffice to rebut employer's nondiscriminatory reason and raise inference of discrimination); *Ruby*, 76 F.3d at 912 (holding no reasonable fact-finder could find that employer's reasons for adverse action were pretextual based on racially derogatory comments uttered in workplace).

Even if Atwater did not engage in conduct that violated the company's rules, the company is entitled to rely on the

information it uncovers that reveals the violations if the employer operates on a good faith belief that the information is true. *See Gill v. Reorganized School District R-6*, 32 F.3d 376, 378-79 (8th Cir. 1994) ("We are not concerned with the correctness or wisdom of the reason given for [the employer's] decision. . . . We are not permitted to second guess the [employer] or to correct an unwise decision if the [employer] gave an honest, nondiscriminatory explanation for [the employer's decision]."); *Meiri v. Dacon*, 759 F.2d 989, 996-97 (2d Cir.) (holding employer's proffer of undisputed, documented examples of employee's inappropriate actions at work provided ample basis for employer's honest belief that job performance was inadequate), *cert. denied*, 474 U.S. 829 (1985); *Turner v. Texas Instr., Inc.*, 555 F.2d 1251, 1256 (5th Cir. 1977) (holding employer truly believed that employee knowingly violated the time card policy and even if employee in fact did not knowingly violate policy, employer acting on its honest belief did not unlawfully discriminate). Considering Atwater presented no evidence that FedEx's reasons for its employment action were not believable, or pretext for unlawful discrimination, Atwater failed to meet her burden at the third stage of *McDonnell Douglas*. Thus, summary judgment was appropriate on her discrimination claims.

CONCLUSION

Atwater cannot magically transform her lack of management acumen and her employment problems into evidence that her employer discriminated against her. The record in this case falls far short of establishing race or sex discrimination, and thus, fully supports the district court's grant of summary judgment in favor of FedEx and the Eighth Circuit's affirmance. Both the district court and the Eighth Circuit applied *Hicks* consistently and appropriately. For these reasons, FedEx respectfully requests that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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